

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

TODD SHARP and MARIA SHARP,  
individuals,

Plaintiffs,

v.

NATIONSTAR MORTGAGE, LLC, an  
unknown business entity; AURORA  
COMMERCIAL CORP., an unknown business  
entity; and DOES 1 through 25, inclusive,

Defendants.

Case No.: 14-CV-00831-LHK

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS WITHOUT  
LEAVE TO AMEND

Plaintiffs Todd Sharp and Maria Sharp ("Plaintiffs") allege that Defendants Nationstar Mortgage, LLC ("Nationstar") and Aurora Commercial Corp. ("Aurora") (collectively, "Defendants") engaged in predatory lending practices to Plaintiffs' detriment. Before the Court is Defendants' Motion to Dismiss. ECF No. 21 ("Mot."). Having considered the submissions of the parties, the relevant law, and the record in this case, the Court GRANTS Defendants' Motion to Dismiss without leave to amend.

**I. BACKGROUND**

**A. Factual Background**

On or around September 27, 2006, Plaintiffs took out a \$997,500.00 loan from Blue Adobe Financial Services, Inc. secured by a deed of trust against real property located at 25011 Hidden

Mesa Court, Monterey, California 93940 (the “Property”). ECF No. 18, Third Amended Complaint (“TAC”) ¶¶ 1, 13-14.

### 1. Foreclosure Timeline

Due to Plaintiffs’ failure to stay current on the loan, Cal-Western Reconveyance recorded a notice of default on June 17, 2009. TAC ¶¶ 18-19. On November 15, 2010, the deed of trust was assigned to Aurora. ECF No. 22-5. After Plaintiffs failed to cure the delinquency, a notice of trustee’s sale was recorded on December 15, 2010, setting a sale date of January 4, 2011. ECF No. 22-4. The sale did not proceed, however, and on June 28, 2012, Aurora assigned the deed of trust to Nationstar. ECF No. 22-6; TAC ¶ 38.

A second notice of trustee’s sale was recorded on December 18, 2012, setting a sale date of January 15, 2013. ECF No. 22-7. The Property was eventually sold at public auction on March 5, 2013, at which time it reverted to Nationstar. ECF No. 22-8.

After purchasing the Property, Nationstar filed an unlawful detainer action against Plaintiffs in Monterey County Superior Court on March 28, 2013. ECF No. 22-9; TAC ¶ 42. On July 2, 2013, the state court entered judgment against Plaintiffs and in favor of Nationstar, and issued a writ of possession. ECF No. 22-10; ECF No. 22-11.

### 2. Plaintiffs’ Allegations

Plaintiffs allege that sometime prior to February 2009 Plaintiffs contacted Aurora and requested an alternative to foreclosure. TAC ¶¶ 24. On February 17, 2009, following a series of “workout agreements” written on Aurora letterhead, Plaintiffs began making payments to Aurora to avoid foreclosure and to help Plaintiffs earn the right to refinance. *Id.* ¶¶ 26-27. Plaintiffs allege that these written agreements were intended as foreclosure prevention alternatives. *Id.* ¶ 31. Plaintiffs allege further that in return for these payments, Aurora promised to modify Plaintiffs’ loan. *Id.* ¶ 32.

On November 24, 2010, Aurora returned Plaintiffs’ most recent payment, notifying Plaintiffs that their payment did not make the loan current, that Plaintiffs had no arrangement with Aurora to bring the loan current, and that the loan would be referred to foreclosure as a result. TAC ¶ 33.

On this basis, Plaintiffs assert six causes of action against Defendants: (1) intentional misrepresentation; (2) negligent misrepresentation; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; (5) promissory estoppel; and (6) negligence. TAC ¶¶ 59-75, 91-121. Plaintiffs bring two additional causes of action against Aurora only concerning the foreclosure postponement payments: (1) conversion; and (2) embezzlement. *Id.* ¶¶ 76-90.

### 3. Plaintiffs' Bankruptcy Petitions

Plaintiffs have collectively submitted four bankruptcy petitions and received a series of automatic stays from any act to obtain possession of property of the estate until the time of dismissal or discharge of the bankruptcy proceedings. *See, e.g.*, ECF No. 22-25 at 7 (noting that the court lifted the automatic stay in Todd Sharp's bankruptcy proceeding on December 18, 2013).

On July 24, 2013, a bankruptcy petition was filed on behalf of Todd Sharp in the Northern District of California. ECF No. 22-12. According to Plaintiffs, this "inadequate and incomplete" petition was filed by Gregory Lowe ("Lowe"), an attorney with Capital Law. TAC ¶¶ 50-51.

Plaintiffs allege that a company known as "Help U Stay" filed three additional bankruptcies, all in the Central District of California, on behalf of Maria Sharp. TAC ¶¶ 52-53. The first petition was filed on July 23, 2013, ECF No. 22-15; the second on October 7, 2013, ECF No. 22-18; and the third on February 3, 2014, ECF No. 22-21.

None of the four bankruptcy petitions disclosed Plaintiffs' claims against Nationstar and Aurora. *See* ECF No. 22-12 at 12 (Todd Sharp listing no "counterclaims of the debtor"); ECF No. 22-15 at 16 (Maria Sharp listing no "counterclaims of the debtor"); ECF No. 22-18 at 16 (same); ECF No. 22-21 at 14 (same). All four bankruptcies were ultimately dismissed for Plaintiffs' failure to appear or to file required documents. *See* ECF No. 22-14; ECF No. 22-17; ECF No. 22-20; ECF No. 22-23. After her third bankruptcy petition was dismissed on March 20, 2014, Maria Sharp was "prohibited from filing any new bankruptcy petition within 180 days of th[at] date." ECF No. 22-23 at 2.

### B. Procedural History

On January 6, 2014, Plaintiffs filed their original complaint in Monterey County Superior Court. ECF No. 1. On January 22, 2014, Plaintiffs filed a First Amended Complaint ("FAC"). *Id.*

On February 25, 2014, Defendants removed the case to this Court. *Id.* Defendants moved to dismiss Plaintiffs' FAC on March 4, 2014. ECF No. 5. Rather than respond to Defendants' motion, Plaintiffs filed a Second Amended Complaint ("SAC") on March 28, 2014, ECF No. 8, which mooted Defendants' motion, *see* ECF No. 16 at 3 n.1.

On April 8, 2014, Defendants moved to dismiss Plaintiffs' SAC. ECF No. 11. Plaintiffs opposed the motion on April 22, 2014, ECF No. 12, and Defendants replied on April 29, 2014, ECF No. 13. On September 3, 2014, the Court granted Defendants' motion, concluding that Plaintiffs were "judicially estopped from pursuing their claims in this case" because "none of [Plaintiffs'] four bankruptcy petitions, all of which were filed after March 2013, disclosed any claims against Nationstar or Aurora." ECF No. 16 at 8-9. Although the Court was "doubtful that [Plaintiffs] will be able to plead facts sufficient to avoid the application of judicial estoppel in an amended pleading," the Court granted leave to amend in case Plaintiffs could "plead facts to establish that the failure to disclose claims against Defendants in [Plaintiffs'] bankruptcy petitions resulted from inadvertence or mistake." *Id.* at 11.

Plaintiffs filed their TAC on September 24, 2014, and Defendants filed the instant Motion to Dismiss on October 17, 2014. In connection with this motion, Defendants have also filed a request for judicial notice. ECF No. 22. Plaintiffs filed their Opposition to the instant motion on October 31, 2014. ECF No. 24 ("Opp."). Defendants filed their Reply on November 7, 2014. ECF No. 25.

## **II. LEGAL STANDARDS**

### **A. Motion to Dismiss**

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). The Supreme Court has held that Rule 8(a) requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009). “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it “may look beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor must the Court “assume the truth of legal conclusions merely because they are cast in the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal quotation marks omitted). Mere “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

#### **B. Request for Judicial Notice**

The Court generally may not look beyond the four corners of a complaint in ruling on a Rule 12(b)(6) motion, with the exception of documents incorporated into the complaint by reference, and any relevant matters subject to judicial notice. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001). Under the doctrine of incorporation by reference, the Court may consider on a Rule 12(b)(6) motion not only documents attached to the complaint, but also documents whose contents are alleged therein, provided the complaint “necessarily relies” on the documents or contents thereof, and the documents’ authenticity and relevance are uncontested. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010); *accord Lee*, 250 F.3d at 688-89. The purpose of this rule is to “prevent plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting documents upon which their claims are based.” *Swartz*, 476 F.3d at 763 (alterations and internal quotation marks omitted).

The Court also may take judicial notice of matters that are either (1) generally known within the trial court's territorial jurisdiction or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Proper subjects of judicial notice when ruling on a motion to dismiss include legislative history reports, *see Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012); court documents already in the public record and documents filed in other courts, *see Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002); and publicly accessible websites, *see Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010).

### C. Leave to Amend

If the Court determines that the complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted). When dismissing a complaint for failure to state a claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Id.* at 1130 (internal quotation marks omitted). Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).

### III. DISCUSSION

Defendants make a series of arguments in support of their Motion to Dismiss. First, Defendants argue that the doctrine of collateral estoppel bars Plaintiffs' claims because the state court unlawful detainer judgment secured against Plaintiffs conclusively negates the claims asserted in the TAC, that judgment was final, and Plaintiffs were parties to the unlawful detainer action. Mot. at 5-7. Second, Defendants contend that Plaintiffs are judicially estopped from pursuing their claims. *Id.* at 7-9. Specifically, Defendants assert that Plaintiffs failed to disclose

1 any causes of action against Nationstar and Aurora on their bankruptcy petitions, and thus are  
2 estopped from pursuing the instant litigation. *Id.* Lastly, Defendants variously argue that  
3 Plaintiffs' claims are time-barred, insufficiently pleaded, or otherwise fail as a matter of law. *Id.* at  
4 9-16.

5 For the reasons explained below, the Court concludes that Plaintiffs are judicially estopped  
6 from pursuing this action. Accordingly, the Court need not reach Defendants' remaining  
7 arguments in favor of dismissal.

8 **A. Judicial Notice**

9 "Even if a document is not attached to a complaint, it may be incorporated by reference into  
10 a complaint if the plaintiff refers extensively to the document or the document forms the basis of  
11 the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). "The defendant  
12 may offer such a document, and the district court may treat such a document as part of the  
13 complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under  
14 Rule 12(b)(6)." *Id.*

15 Here, several of Plaintiffs' claims for relief depend upon information contained in their  
16 deeds of trust, the substitutions of trustee, the notice of default, the trustee's deeds upon sale, and  
17 Plaintiffs' four bankruptcy petitions. Moreover, the documents relating to Plaintiffs' bankruptcy  
18 proceedings and orders entered in state court are judicially noticeable because they are matters of  
19 public record. *See Holder*, 305 F.3d at 866. Accordingly, the Court GRANTS Defendants' request  
20 for judicial notice. *See Hayes v. Wells Fargo Bank, N.A.*, No. 3:13-CV-0420 KAW, 2013 WL  
21 4117050, at \*3-4 (N.D. Cal. Aug. 12, 2013) (taking judicial notice of similar documents).

22 **B. Judicial Estoppel**

23 Judicial estoppel is an equitable doctrine, invoked by a court at its discretion, which  
24 precludes a party from gaining an advantage by asserting one position and subsequently taking a  
25 clearly inconsistent position. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th  
26 Cir. 2001). The doctrine applies to prevent a party from asserting inconsistent positions in  
27 different cases, as well as in a single litigation. *Id.* at 783. The Supreme Court has identified three  
28 factors that courts may consider in determining whether to apply the doctrine of judicial estoppel:



(1) whether a party's position is "clearly inconsistent" with its earlier position; (2) whether the first court accepted the party's earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). "In addition to these factors, the Ninth Circuit examines whether the party to be estopped acted inadvertently or with any degree of intent." *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1164 (C.D. Cal. 2008) (internal quotation marks omitted). "If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply." *Johnson v. Or. Dep't of Human Res.*, 141 F.3d 1361, 1369 (9th Cir. 1998).

"In the bankruptcy context, the federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013). The application of judicial estoppel in the bankruptcy setting is important "to protect the integrity of the bankruptcy process," for "[t]he debtor, once he institutes the bankruptcy process, disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets." *Hamilton*, 270 F.3d at 785 (emphasis added). Further, because the Bankruptcy Code subjects debtors to a continuing duty to disclose all pending and potential claims, *see* 11 U.S.C. § 521(a)(1), judicial estoppel bars a plaintiff from pursuing a claim that the plaintiff failed to disclose in his bankruptcy proceeding even when the claim arose after the bankruptcy petition was initially filed, *see Hamilton*, 270 F.3d at 785. Indeed, "[j]udicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset." *Id.* at 784; *see also Ah Quin*, 733 F.3d at 272-73 (applying "a presumption of deliberate manipulation" where "a plaintiff-debtor has *not* reopened bankruptcy proceedings" and "filed amended bankruptcy schedules that properly listed this claim as an asset").

In this case, the facts and events upon which Plaintiffs base their claims occurred between February 17, 2009, when Plaintiffs began to make foreclosure postponement payments to Aurora,



1 and March 28, 2013, when Nationstar filed an unlawful detainer action in state court to obtain  
 2 ownership of the property. TAC ¶¶ 24-42. Thus, Plaintiffs had “knowledge of enough facts to  
 3 know [of] a potential cause of action” against Defendants by the end of March 2013 at the latest.  
 4 *Hamilton*, 270 F.3d at 784.

5 Despite being on notice of the existence of facts that purportedly support a cause of action  
 6 against Defendants, none of Plaintiffs’ four bankruptcy petitions, all of which were filed after  
 7 March 2013, disclosed any claims against Nationstar or Aurora. *See* ECF No. 22-12 at 12; ECF  
 8 No. 22-15 at 16; ECF No. 22-18 at 16; ECF No. 22-21 at 14. In fact, Maria Sharp’s third  
 9 bankruptcy petition was filed after the initiation of this lawsuit.<sup>1</sup> *Compare* ECF No. 1 at 2 (noting  
 10 that Plaintiffs filed their original complaint on January 6, 2014), *with* ECF No. 22-21 at 2 (noting  
 11 that Maria Sharp filed her third bankruptcy petition on February 3, 2014).

12 Weighing the factors that govern the application of judicial estoppel, the Court finds once  
 13 again that Plaintiffs are judicially estopped from pursuing their claims in this case. First, by failing  
 14 to list claims against Aurora and Nationstar in their bankruptcy petitions, Plaintiffs have asserted  
 15 “clearly inconsistent” positions across cases. *See Hamilton*, 270 F.3d at 784 (“[Plaintiff] clearly  
 16 asserted inconsistent positions. He failed to list his claims against [defendant] as assets on his  
 17 bankruptcy schedules, and then later sued [defendant] on the same claims.”). Plaintiffs concede as  
 18 much. *See Opp.* at 8 (“The inconsistency here is that in Todd Sharp’s bankruptcy he did not  
 19 disclose the misconduct of Aurora or Nationstar. The subsequent bankruptcies . . . also failed to  
 20 mention these claims.”).

21 Second, the bankruptcy courts “accepted” Plaintiffs’ position and granted them the benefit  
 22 of four automatic stays pursuant to 11 U.S.C. § 362. *See Hamilton*, 270 F.3d at 784-85 (“Our  
 23 holding does not imply that the bankruptcy court must actually discharge debts before the judicial  
 24 acceptance prong may be satisfied. The bankruptcy court may ‘accept’ the debtor’s assertions by  
 25 relying on the debtor’s nondisclosure of potential claims in many other ways. . . . [Plaintiff] did  
 26

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27 <sup>1</sup> Plaintiffs received the benefit of an automatic stay pursuant to 11 U.S.C. § 362 upon filing  
 28 each of their petitions. Each petition was subsequently dismissed. *See* ECF No. 22-14; ECF No.  
 22-17; ECF No. 22-20; ECF No. 22-23.

1 enjoy the benefit of [] an automatic stay . . . .”); *see also Swendsen v. Ocwen Loan Servicing, LLC*,  
 2 No. 13-2082, 2014 WL 1155794, at \*5-6 (E.D. Cal. Mar. 21, 2014) (automatic bankruptcy stay is  
 3 sufficient to meet judicial acceptance prong); *HPG Corp. v. Aurora Loan Servs., LLC*, 436 B.R.  
 4 569, 578 (E.D. Cal 2010) (same). Plaintiffs do not disagree. *See Opp.* at 8.

5 Lastly, as to unfair advantage, Plaintiffs’ repeated failure to disclose their claims against  
 6 defendants deceived the bankruptcy court and thus undermined the integrity of the bankruptcy  
 7 process. *See Hamilton*, 270 F.3d at 784-85; *see also Swendsen*, 2014 WL 1155794, at \*6 (“The  
 8 law in this area is clear: a plaintiff who has received the benefit of an automatic stay under 11  
 9 U.S.C. § 362(a) would receive an unfair advantage by prosecuting claims against a defendant after  
 10 failing to disclose those claims in his bankruptcy proceedings.”).

11 In response, Plaintiffs advance a variant of the “inadvertence or mistake” defense to judicial  
 12 estoppel: they attempt to shift the blame to other parties. *See Ah Quin*, 733 F.3d at 271-78. “[I]t  
 13 was not,” Plaintiffs argue “the chicanery, misrepresentation, mistake or inadvertence of the  
 14 *Plaintiffs* which resulted in the claims being absent from their bankruptcy schedules.” *Opp.* at 9  
 15 (emphasis added). “Rather, it was the fault of Gregory Lowe and later Help U Stay,” Plaintiffs  
 16 contend. *Id.* With respect to Todd Sharp’s bankruptcy filing of July 24, 2013, Plaintiffs allege that  
 17 Lowe, an attorney with Capital Law, filed an “inadequate and incomplete” petition on Todd  
 18 Sharp’s behalf. TAC ¶ 50. As evidence of counsel’s malpractice, Plaintiffs allege further that  
 19 “Lowe was ordered by the Northern District Bankruptcy Court on December 6, 2013 to return  
 20 funds to the[m].” *Id.* ¶ 51; *see also ECF No. 18-2* at 49. With respect to the three additional  
 21 “incomplete” bankruptcy petitions naming Maria Sharp but supposedly filed by Help U Stay,  
 22 including the one filed after this lawsuit began, Plaintiffs claim that they “were not informed of  
 23 these ban[k]ruptcies.” TAC ¶ 53.

24 The Court is not convinced. To begin, the Court notes that in Plaintiffs’ opposition to  
 25 Defendants’ initial motion to dismiss, Plaintiffs claimed that their repeated failure to disclose their  
 26 claims against Defendants was an “unintentional mistake[]” resulting from “not having adequate  
 27 representation.” *ECF No. 12* at 6. Plaintiffs, thus, have changed their tune. In addition, the  
 28 judicially noticeable record indicates that Plaintiffs have engaged in a pattern of filing skeletal

bankruptcies (or having others file such bankruptcies on their behalf), obtaining an automatic stay, and then failing to appear at the scheduled meeting of creditors or failing to file required documents. *See* ECF No. 22-14; ECF No. 22-17; ECF No. 22-20; ECF No. 22-23. In fact, after her third bankruptcy petition was dismissed on March 20, 2014, Maria Sharp was “prohibited from filing any new bankruptcy petition within 180 days of th[at] date.” ECF No. 22-23 at 2. Plaintiffs’ allegation that a third party was filing rogue petitions naming Maria Sharp is simply not credible. Importantly, Plaintiffs do not allege that they ever corrected any of the four bankruptcy filings to include their claims against Defendants. *See Ah Quin*, 733 F.3d at 272 (“A key factor is that Plaintiff reopened her bankruptcy proceedings and filed amended bankruptcy schedules that properly listed this claim as an asset.”). As a result, the Court applies “a presumption of deliberate manipulation” that Plaintiffs, for the reasons stated, have not overcome. *Id.* at 273.

Plaintiffs’ citations to *Just Film, Inc. v. Merchant Services, Inc.*, 873 F. Supp. 2d 1171 (N.D. Cal. 2012), and *Gaudin v. Saxon Mortgage Services, Inc.*, 820 F. Supp. 2d 1051 (N.D. Cal. 2011), are unavailing. In *Just Film*, the court declined to apply judicial estoppel because the plaintiff-debtor had “told his bankruptcy attorney about this case during the original bankruptcy proceedings,” but the attorney had “failed to include it in the schedule.” 873 F. Supp. 2d at 1179. Moreover, the “undisputed evidence” in *Just Film* established that the plaintiff-debtor had “directly told the trustee about this case at the initial creditors’ meeting” and had “re-opened the case and remedied his error.” *Id.* Here, by contrast, at least two of Plaintiffs’ bankruptcy petitions were dismissed for failure to appear at the creditors’ meetings, *see* ECF No. 22-17; ECF No. 22-20, and Plaintiffs never corrected any of their disclosures. *Gaudin*, on the other hand, does not even concern the defense of inadvertence or mistake. There, the court found that the defendant had not “shown how any position Gaudin took in the bankruptcy action is inconsistent with her position here.” *Gaudin*, 820 F. Supp. 2d at 1053. Here, of course, Plaintiffs concede that they have taken inconsistent positions in their bankruptcy filings. *See* Opp. at 8. *Gaudin* is therefore inapposite.

The Court therefore finds that Plaintiffs have failed to allege facts plausibly suggesting that their repeated failure to disclose claims against Nationstar and Aurora in Plaintiffs’ bankruptcy petitions was the result of inadvertence or mistake. Having weighed the relevant factors, the Court

concludes in its discretion that Plaintiffs are judicially estopped from pursuing their claims in the instant lawsuit.

**IV. CONCLUSION**

For the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss. Plaintiffs have had an opportunity to cure the deficiencies identified in the Court's prior order dismissing Plaintiffs' claims on judicial estoppel grounds, and they have failed to do so. Accordingly, the Court finds that further amendment would be futile and will not grant leave to amend. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 593 & n.8 (9th Cir. 2014).

The Clerk shall close the case file.

**IT IS SO ORDERED.**

Dated: January 7, 2015

  
LUCY H. KOH  
United States District Judge

United States District Court  
For the Northern District of California